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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
Southwestern Bell Telephone Company) CC Docket No. 97-158
Tariff F.C.C. No. 73) Transmittal No. 2633

COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits its comments in support of Southwestern Bell Telephone Company's ("SWBT") Petition for Reconsideration of the Federal Communications Commission's ("Commission") recent Order rejecting the above-referenced transmittal.¹

I. INTRODUCTION

The Commission should reconsider the Competitive Response Tariff Rejection Order and remove unnecessary regulations that prevent incumbent local exchange carriers ("LEC") from fashioning appropriate responses to competition in the interstate access market. As the Commission recently recognized in the Access Charge Reform proceeding, the overriding purpose of the 1996 Act is that of "opening all telecommunications markets to competition."² The deregulatory goals

¹ In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, CC Docket No. 97-158, Transmittal No. 2633, Order Concluding Investigation and Denying Application for Review, FCC 97-394, rel. Nov. 14, 1997 ("Competitive Response Tariff Rejection Order").

² In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line

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of the 1996 Act reflect the undisputed determination that competition, not regulation, offers the most effective means for ensuring that consumers receive access to high-quality telecommunications services at the lowest possible prices. Indeed, Section 10 of the 1996 Act provides that the Commission “shall forbear” from applying a regulation if that regulation is not necessary to preserve the reasonableness of rates or to otherwise protect consumers.³ Accordingly, the Commission has committed to “eliminate, either now or as soon as changes in the marketplace permit, any unnecessary regulatory requirements on incumbent LEC exchange access service.”⁴

Consistent with these deregulatory goals, the Commission should allow incumbent LECs to offer their customers alternatives to “plain vanilla” generic tariff offerings. In particular, incumbent LECs should have the flexibility (1) to respond competitively to customers’ request for proposals (“RFP”) and (2) to provide integrated service packages tailored to meet their customers’ needs. For example, SWBT’s tariff filing at issue in this proceeding was designed to respond competitively to RFPs received from AT&T Corp. (“AT&T”) and Coastal Telephone

Charges, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, FCC 97-158 ¶ 262, rel. May 16, 1997 (“Access Reform Order”), appeals pending sub nom. Southwestern Bell Telephone Company v. FCC, Nos. 97-2618, et al. (8th Cir.) (quoting Joint Explanatory Statement).

³ 47 U.S.C. § 160(a).

⁴ In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd. 21354, 21359 ¶ 5 (1996) (“Access Reform NRPM”).

Company ("Coastal"). Given the presence of these RFPs, SWBT reasonably concluded that its reduced price would meet the equally low price of its competitors. Thus, SWBT's competitive response tariff satisfies the Commission's established standard for applying the competitive necessity doctrine.⁵

II. THE COMMISSION SHOULD ACT QUICKLY TO REMOVE UNNECESSARY REGULATIONS THAT PREVENT INCUMBENT LECS FROM RESPONDING TO BURGEONING COMPETITION IN THE INTERSTATE ACCESS MARKET

SWBT and U S WEST submitted substantial evidence in the record of this proceeding demonstrating that the interstate access market is highly competitive. Specifically, SWBT presented market share loss data for the markets where it is seeking to offer RFP tariffs (e.g., Dallas and Houston) and indicated that its market share loss in major markets exceeds 40% in some cases.⁶ In addition, SWBT's tariff filing included the actual RFP letters from AT&T and Coastal requesting competitive bids for access services.⁷ As further evidence of competition, U S WEST submitted documentation showing that it also has experienced significant losses of market share in the high-capacity access (i.e., DS1 or DS3) market in large cities

⁵ The competitive necessity doctrine permits a dominant carrier to justify a tariff offering by demonstrating that: (1) the customers of the discounted offering have equal or lower priced alternatives that are generally available from which to choose; (2) the discounted offering responds to competition without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users. *Id.* at ¶ 34. In the Competitive Response Tariff Rejection Order, the Commission did not reach the issue of whether SWBT's tariff offering satisfied the competitive necessity doctrine.

⁶ SWBT Direct Case, filed Aug. 13, 1997 at 8.

⁷ Competitive Response Tariff Rejection Order ¶ 10.

throughout its region.⁸ This compelling market data was undisputed.

Nevertheless, in the Competitive Response Tariff Rejection Order, the Commission failed to acknowledge this burgeoning competition in the interstate access market. Rather, based on outdated assumptions about the incumbent LECs' ability to exert market power in the interstate access market, the Commission concluded that the benefit of allowing SWBT to respond on a customer-specific basis to a written bid request "is outweighed by the threat that SWBT will use such pricing flexibility unreasonably to deter or foreclose entry."⁹ As a result of the dramatic changes that have occurred in the interstate access market – such as the market-opening requirements of the 1996 Act and the proliferation of facilities-based competitors – it is no longer necessary to prohibit incumbent LECs from responding to their competitors' price reductions. Thus, the Commission should reject the self-serving arguments of AT&T, MCI Telecommunications Corporation ("MCI") and other competitors that such restrictions on competition in the high-capacity access market are needed to facilitate competition in all other access

⁸ See, e.g., Comments of U S WEST, Inc. on SWBT's Direct Case at 13, filed Aug. 28, 1997 ("U S WEST Comments").

⁹ Competitive Response Tariff Rejection Order ¶ 54. To the extent that the Commission's restriction on incumbent LEC competitive response tariffs could be interpreted as implementing a broad policy that protects new entrants by requiring incumbent LECs to compete inefficiently in the interstate access market, such a protectionist policy would clearly be prohibited by the Communications Act. The Commission only has the authority to promote competition, not individual competitors. See In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, 508-9 (1980).

markets.¹⁰

Indeed, the Commission itself previously acknowledged that the incumbent LECs' interstate access services already face real competition in many quarters and that a "competing provider [of such services] can . . . target selectively the incumbent LEC's high-volume end users with efficiently priced access service offerings."¹¹ In addition, the Commission recognized that continued regulation of incumbents' offerings in the face of that competition substantially distorts the marketplace by "plac[ing] the incumbent LEC at a regulatorily-imposed disadvantage in competing for high-volume end users."¹² Accordingly, the Commission should promote vigorous competition in the interstate access market by removing unnecessary restrictions that prevent incumbent LECs from fashioning appropriate responses to competition.

U S WEST also agrees with the separate statements of Commissioners

¹⁰ This argument is particularly suspect given that a number of these competitors have clearly expressed their intent to cherry-pick large business customers in the high-capacity access market and essentially ignore the residential access market. AT&T, for example, has withdrawn from its previously announced plans to compete in residential service in order to concentrate on profitable business markets. See Mike Mills, AT&T Corp. Halts Efforts to Sell Local Residential Phone Service, Washington Post, Dec. 19, 1997, at G1. Similarly, WorldCom has stated flatly that "[o]ur strategy is not in the consumer business." Mike Mills, WorldCom Would Shift MCI's Focus, Washington Post, Oct. 3, 1997, at A1 (quoting John Sidgmore, WorldCom Vice Chairman); see also Mike Mills, Hanging Up on Competition?, Washington Post, June 1, 1997, at H1 (quoting Bernard Ebbers, WorldCom Chairman and CEO, as stating that "not AT&T, not MFS or anyone else, is going to build local telephone facilities to residential customers. Nobody ever will, in my opinion.").

¹¹ Access Reform NPRM, 11 FCC Rcd. at 21361 ¶ 8.

¹² Id.

Furchtgott-Roth and Powell that the issue of additional pricing flexibility for incumbent LECs should be addressed in the pending Access Charge Reform proceeding.¹³ The evidence of emerging, and in some cases full-blown, competition submitted by SWBT and U S WEST in the instant proceeding clearly supports the adoption of such pro-competitive measures, as does the Commission's statutory obligation under the 1996 Act to act in a manner that promotes competition and minimizes needless regulation. Irrespective of the proceeding in which regulatory relief is granted, it is imperative that the Commission act quickly so that incumbent LECs are not precluded from responding to competition.

III. THE COMMISSION SHOULD NOT LIMIT INCUMBENT LECS TO PROVIDING PLAIN VANILLA GENERIC TARIFF OFFERINGS

U S WEST also submitted a detailed economic analysis demonstrating the benefits of permitting incumbent LECs to enter into customer-specific arrangements as an alternative to "plain vanilla" generic tariff offerings. Such arrangements will give incumbents the flexibility to align prices and costs, and decrease the costs and uncertainty on both sides of the transaction.¹⁴ Preventing

¹³ U S WEST notes that in the Access Reform proceeding, the Commission proposed allowing incumbent LECs to offer competitive response tariffs in response to a competitor's offer to an end user or in response to an RFP. Id. at 21439-40 ¶ 196. U S WEST believes that the ability to offer such competitive responses should be triggered in each state by the negotiation of a signed interconnection agreement. Comments of U S WEST, Inc., CC Docket Nos. 96-262, et al., filed Jan. 29, 1997 at 30.

¹⁴ U S WEST Comments at Attachment Affidavit of Robert G. Harris at 7 ¶ 10 (Aug. 27, 1997) ("Harris Affidavit"). The affidavit of Douglas R. Mudd submitted with SWBT's Petition addresses the economic benefits of RFPs as a means of contributing to, rather than harming, the competitive process. Affidavit of Douglas R. Mudd at 4 (Dec. 15, 1997) ("Mudd Affidavit").

incumbent LECs from using discounts or similar mechanisms for sharing cost savings under customer-specific agreements impedes competition and prevents customers from obtaining the lowest possible price for the services they purchase.¹⁵ Further, as evidenced by past experience with other regulated industries, overly restricting the activities of incumbents LECs while not constraining their competitors in the access services market will lead to inefficient prices and production and cause the incumbent LECs to unnecessarily suffer devastating losses.¹⁶

In addition, the same considerations that led the Commission to give AT&T pricing flexibility to meet competition – long before AT&T was found to face substantial competition, much less to be non-dominant – are clearly present today with respect to access services.¹⁷ The Commission applied the doctrine to AT&T's private line and MTS service in the mid-1980s because AT&T then faced emerging – not full or substantial – competition. In particular, the Commission recognized that “the essence of an emerging competitive process is that firms which at one time may have had great discretion in setting prices are no longer free to do so without competitive consequences.”¹⁸ Thus, the Commission concluded that it should not prevent AT&T from engaging in competition until it was determined that the

¹⁵ Harris Affidavit at 8 ¶ 12.

¹⁶ Id. at 12-15 ¶¶ 19-21.

¹⁷ See In the Matter of Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd. 5880 (1991).

¹⁸ In the Matter of Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, Memorandum Opinion and Order, 59 Rad. Reg. 2d (P&F) 70, 81 ¶ 45 (1985).

market was fully competitive because “[t]o restrain AT&T from competing until such a hypothetical degree of competition develops would send erroneous signals to the market.”¹⁹

There is compelling evidence in the record of this proceeding demonstrating that, like the interexchange services market in the 1980s, incumbent LECs today face competition that is emerging, and in the case of high-capacity access services for high-volume customers, is full blown in many markets. Further, under the 1996 Act, interstate access markets are indisputably open to competition. As a result, there is no basis for barring incumbent LECs from fashioning appropriate responses to competition in the interstate access market.

In particular, the Commission should allow incumbent LECs to file RFP tariffs that are generally available to similarly situated customers, just as it has approved such tariffs in the past.²⁰ As the Commission concluded more than ten years ago: “The fact that such a bidding process takes place indicates both the existence of competitive alternatives . . . and the customer’s willingness and ability to use” them.²¹ SWBT, for example, received a letter from AT&T indicating that because its tariff prices are “significantly higher than those of other access providers in the area, AT&T is requesting that SWBT prepare a proposal for the

¹⁹ Id. at 82 ¶ 48.

²⁰ Competitive Response Tariff Rejection Order at n.105 (noting that AT&T’s RFP tariff – Tariff 15 – was allowed to take effect based on competitive necessity once AT&T specified that the service offering would also be available to all similarly situated customers).

²¹ In the Matter of Decreased Regulation of Certain Basic Telecommunications Services, Notice of Proposed Rulemaking, 2 FCC Rcd. 645, 650 ¶ 35 (1987).

Dallas traffic.”²² This anecdotal evidence supports the Commission’s conclusion that RFPs are a good indication of competition.

U S WEST recognizes that it can be difficult to apply the competitive necessity doctrine to RFP tariffs.²³ These practical problems, however, are not insurmountable and should not result in a blanket prohibition on incumbent LEC RFP tariffs. All that incumbent LECs are seeking is parity of regulation. If it is lawful for the incumbent LECs’ competitors to offer single customer discounts (in response to RFPs or otherwise), then it must be lawful as well for incumbents to respond to those offers.

The Commission also should approve incumbent LECs’ tariffs for integrated packages of interstate access services in the same manner in which it approved AT&T’s early Tariff 12 packages.²⁴ Starting in 1988, as it faced increasing competitive pressures from other interexchange carriers, AT&T began designing customized packages of services to meet the particular needs of individual customers and then making such packages generally available to similarly situated customers. The Commission’s decision to approve Tariff 12 was simply based on its finding that integrated packages of services were not “like” disaggregated offerings

²² Mudd Affidavit at 2.

²³ U S WEST is not advocating that incumbent LECs should be allowed to engage in any activity that is currently deemed unlawful, such as obtaining in advance information about competitive bids submitted in response to an RFP.

²⁴ In the Matter of AT&T Communications Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order on Remand, 6 FCC Rcd. 7039, 7051 ¶¶ 66-67 (1991).


of the various component services.²⁵ Consistent with its prior treatment of AT&T, the Commission should approve incumbent LECs' tariffs for integrated packages of interstate access services that are made generally available to similarly situated customers.

For these reasons, the Commission should reconsider the Competitive Response Tariff Rejection Order and allow incumbent LECs to fashion appropriate responses to competition in the interstate access market, including RFP tariffs and integrated service packages.

Respectfully submitted,

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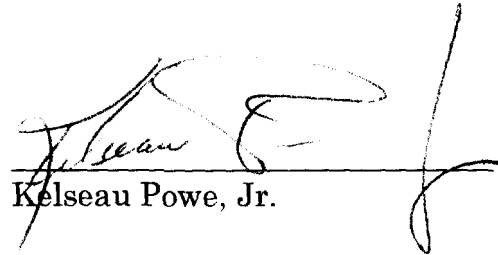
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January 12, 1998

²⁵ Id. at 7055 ¶ 87.

CERTIFICATE OF SERVICE

I, Kelseau Powe Jr., do hereby certify that on this 12th day of January, 1998, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served, via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



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